BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Circuit Court of Appeals is not yet officially reported and is printed in the record at pages 416 to 428.

Jurisdiction

The judgments of the United States Circuit Court of Appeals were rendered on January 25, 1944 (R. 429-432). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938), U. S. Code, Title 28, Section 347, and by Sections 687, 688, U. S. Code, Title 18. This petition is filed within thirty days from the date of the judgments of conviction in the Circuit Court in accordance with the provisions of Rule 11 of the Rules of Practice and Procedure in criminal cases after plea of guilty, verdict or finding of guilt.

Statutes Involved

The Act of July 2, 1940, Chap. 508, Sec. 6, 54 Stat. 714, in so far as material, provided:

> "Sec. 6. Whenever the President determines that it is necessary in the interest of National Defense to prohibit or curtail the exportation of any military equipment or munitions, or component parts thereof, or machinery, tools, or material, or supplies necessary for the manufacture, servicing, or operation thereof, he may by proclamation prohibit or curtail such exportation, except under such rules and regulations as he shall prescribe. Any such proclamation shall describe the articles or materials included in

the prohibition or curtailment contained therein. In case of the violation of any provision of any proclamation, or of any rule or regulation, issued hereunder, such violator or violators, upon conviction shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment."

Proclamation No. 2413 was promulgated by the President under authority of the Act of July 2, 1940, and its pertinent provisions provide as follows:

"* * * I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the said Act of Congress, do hereby proclaim that the administration of the provisions of Section 6 of that act is vested in the Administrator of Export Control, who shall administer such provisions under such rules and regulations as I shall from time to time prescribe in the interest of national defense.

AND I do hereby further proclaim that upon the recommendation of the aforesaid Administrator of Export Control, I have determined that it is necessary in the interest of the National Defense that on and after July 5, 1940, the articles and materials hereinafter listed shall not be exported from the United States except when authorized in each case by a license as hereinafter provided:

2. The following basic materials and products containing the same:

q. Platinum group metals.

AND I do hereby empower the Secretary of State to issue licenses authorizing the exportation of any of the said articles and materials the exportation of which is not already subjected to the requirement that a license be obtained from the Secretary of State authorizing their exportation and I do hereby

authorize and enjoin him to issue or refuse to issue licenses authorizing the exportation of any of the articles or materials listed above in accordance with the aforesaid rules and regulations or such specific directives as may be, from time to time, communicated to him by the Administrator of Export Control. • • •"

Title 18, Sec. 88, U. S. C. A., provides:

"Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both."

ARGUMENT

POINT I

The decision of the Circuit Court below with respect to the "Barth Transaction" is based upon an erroneous interpretation and application of the Export Control Law.

A. The Substantive Offense

The decision of the Circuit Court below, as gathered from its opinion, is based upon the conclusion that, "The regulations plainly contemplated that a license was to be issued only to the particular person named in the application; the licenses were not transferable nor were they transferred. Neither defendant nor his company, Chemical Marketing Company, were named in the licenses, those

names having been intentionally and deliberately withheld in the applications. The defendant, having exported without licenses, violated the President's regulations and therefore violated 50 U. S. C. A. Appendix Sec. 701. The conviction for this exportation was proper (R. 420)." This interpretation of the regulations is repugnant to the spirit and intent of the law.[1]

The plainly expressed purpose of the Act of July 2, 1940 is to prevent the export of certain strategic materials "in the interest of national defense." The United States was not at war with any nation at the time this Act was passed and it should therefore be construed in the light of conditions then prevailing, unaffected by our subsequent entry into the conflict. It does not appear from the language of the Statute that the restrictions against unlicensed export of essential materials were directed against any particular individual, country or continent; nor does the Act contemplate the licensing of one individual as against another to take part in an export transaction, as the lower Court seems to hold. The power granted under the Act to the President, or such other authorities duly designated by him, authorizing him to prohibit or curtail the exportation of any materials, is limited to the extent that he is first required to determine that such materials are necessary for national defense. It is clear that in the absence of such determination, such materials can legally be exported without a license. There is no support for the assumption of power to consider, as the basis for any determination, the nature of the shipper or the ultimate destination of the materials. The sole controlling factor is the national need

1. Primarily, in the construction of a statute it is essential to ascertain and give effect to the intent of the legislative body. *Darby-Lynde Co.* v. *Alexander*, 51 F. (2d) 56; *Stevens* v. *Nave-McCord Merc. Co.*, 150 F. 71, 75; *Balanced Rock S. A.* v. *Manitou*, 38 F. (2d) 28, 30; *Moffat Tunnel Imp. Dist.* v. *Denver etc.*, 45 F. (2d) 715, 723.

of such material. It is reasonable to assume that if Congress intended to vest the President with power to prevent export by any particular individual or to any particular country or continent, it would have made specific provision therefor, as it did when it delegated to the President the power to name foreign states and define combat areas under the Neutrality Act of Nov. 4, 1939 (50 Stat. 4). It is not without significance that such power was not specifically delegated to the President under the Act of July 2, 1940.

The punishable offense under the Law is unlicensed exportation of essential materials, and, when the proper authority determines that certain materials are not essential for national defense and issues a license permitting the export thereof, the subsequent act of exportation cannot reasonably be construed as a violation of the Law, no matter who participates therein. Statutes which create and define crimes are strictly construed and their scope is not to be extended by intendment because the Court thinks the lawmaking body should have made them more comprehensive. *Fasulo* v. *U. S.*, 272 U. S. 620, 628; *U. S.* v. *Resnick*, 299 U. S. 207, 209; *Mercantile Commercial Bank & Trust Co.* v. *Howe*, 113 F. (2d) 891, 893. There is no question that export licenses for shipment of strategic materials to Barth in Cali, Colombia, were duly issued by the State Department (Exhibits 48-49, R. 313-322); that the materials mentioned and described in those licenses were the same materials exported; that the licenses accompanied the shipment and were subsequently returned to the State Department in Washington, D. C., after such exportation (R. 105). It is also true that the licenses were issued to Western Commercial Company and not to petitioner; that the licensee did nothing further after the licenses issued; that the licenses were never transferred or assigned; and the petitioner ac-

tively completed the exportation. The grant of the licenses by the State Department presents unassailable proof that the materials were not required or essential to the interests of national defense and inasmuch as the materials that were exported were embraced by the licenses, the act of the exportation cannot be regarded as unlicensed or a violation of the spirit or letter of the law.

B. The Conspiracy Offense

The conspiracy indictment is based mainly on the same facts involved in the substantive offense charged by the indictment in the "Barth Transaction." It follows that if the acts established in connection with the substantive offense did not constitute a violation of the Export Control Laws, then any concert of action or agreement to perform those acts cannot be construed as illegal. In any event the proof reasonably construed clearly demonstrates petitioner's intent to comply with the licensing requirements of the law (R. 292-3; R. 254, fol. 762). The conspiracy charge is not supported by the evidence which fails to show the existence of any agreement or concert of action with any of the individuals or firms named as co-conspirators in the indictment. The Circuit Court is in apparent accord with this view because the only support it can find for the conspiracy charge is derived from the acts of one Heemsoth, who was neither accused or charged with being a conspirator by anyone (R. 24). Heemsoth, a custom house broker and freight forwarder, was engaged by petitioner to procure export licenses, and he cannot be regarded as a conspirator when the proof unequivocally shows that his only participation in the matter was connected with the procurement of those licenses (R. 296, 305, 307). Had the named licensee actually shipped the merchandise, whether as a dummy or otherwise, there is very little likelihood that

there would have been any charge of an unlawful conspiracy. Moreover, neither Heemsoth or any of the other co-conspirators could have had any previous knowledge that the named licensee would be unable to consummate the export or that the petitioner would proceed to use such licenses. Whatever steps were taken to effect the export were the sole acts of the petitioner, who was the only one who can be held responsible, if such acts constitute a violation of the law. Obviously, the petitioner could not conspire with himself. *Bartkus* v. *United States* (7 C. C. A.), 21 F. (2d) 425; *Union Pacific Coal Co.* v. *United States* (C. C. A. 8), 173 Fed. 737. There is nothing in the proof which justifies the conclusion that the proof established an illegal conspiracy.

POINT II

The decision of the Circuit Court concerning the "Mueller Transaction" is based on an erroneous application of the rules applicable to extra-judicial admissions and proof of the *corpus delicti*.

A. The Substantive Offense

Motions for a directed verdict on the ground that the evidence failed to establish that the thirty-five ounces of rhodium were actually exported from the United States were denied primarily on the Government's contention that exportation could be inferred from admissions consisting of entries on the books of account of the Chemical Marketing Company showing payment by petitioner's foreign customers (R. 257-8) for the 35 ounces of rhodium. The Circuit Court sustained the lower Court on this point holding that the jury could infer from the circumstances adduced

that Betty Mueller had the rhodium in her possession when she sailed (R. 425, footnote 4). In other words the jury was permitted to speculate and assume from remote circumstances that a crime had been committed. These rulings are in direct conflict with applicable decisions in the Eighth Circuit which hold that the *corpus delicti* cannot be presumed, but must be proven. *Wagner* v. *U. S.* (C. C. A. 8), 8 F. (2d) 581, 586; *Pines* v. *U. S.* (C. C. A. 8), 123 F. (2d) 825. In the latter case, where the defendant was charged with transporting spurious instruments in interstate commerce it was held:

> Page 829: "The gist of the offense, however, is the transportation of these described spurious instruments in interstate commerce. Having them in possession or even attempting to pass them as genuine was not a Federal offense under this statute. It was therefore of vital importance to prove that the instruments were transported or caused to be transported by someone in interstate commerce. This, being the *corpus delicti*, could not be presumed nor could it be established by extra-judicial declaration, confession or admission of the defendant."

It is fundamental that no conviction can properly be had unless the prosecution establishes the fact that a crime has been committed and, while it is true that the *corpus delicti* may be proven by circumstantial evidence, such proof must nevertheless be strong, cogent and exclude every other hypothesis except that of guilt of the accused. *Vernon* v. *U. S.* (C. C. A. 8), 146 F. 121. The *corpus delicti* of the crime charged under the indictment in the "Mueller Transaction" is the unlicensed exportation of thirty-five ounces of rhodium, and it was incumbent upon the prosecution to establish this fact. The record is devoid of any direct or cogent circumstantial proof from which it may be reasonably concluded that this rhodium was in fact exported. At

most the proof discloses some suspicious circumstances which are inconclusive to establish the essential fact to be proven. The delivery of the rhodium to Mrs. Mueller did not constitute a crime and the fact that the books of petitioner's company reflect payment for such delivery is consistent with a sale thereof in the United States. The circumstances relied on are too remote to permit speculation and conjecture on the question of whether there was a subsequent exportation. It is significant that no proof was adduced to show that Mrs. Mueller had continuous possession of the rhodium from the time of its delivery to her until the time of her departure, that it was in her possession immediately prior to, or at the time that she sailed, that she had it in her possession upon arrival at her destination, or that it was delivered to or observed in the possession of any of petitioner's European customers. Furthermore there is no evidence, written or oral, of any statements or admissions by the petitioner or Mrs. Mueller that they contemplated or intended delivery of the rhodium outside the boundaries of the United States. Proof of facts such as these might possibly be regarded as proper circumstantial evidence upon which to predicate a determination that the rhodium was in fact exported.

The Circuit Court recognizes the conflict in the rules bearing upon corroboration of extra-judicial confessions, but holds that the evidence in the case amply corroborates the petitioner's affidavit irrespective of which rule is followed. Despite this statement, however, it is quite apparent that the Court followed the rule prevailing in those circuits which hold that any corroboration which supports the admission or merely touches upon the *corpus delicti* is sufficient, inasmuch as it applies the corroboration evidence to the support of petitioner's affidavit (R. 426). The inherent weakness of this rule is more apparent when

it is considered that the declarations of the petitioner contain no admission that the rhodium delivered to Mrs. Mueller was exported or that it was intended for export. Proof of that fact is the *sine qua non* of the crime to be established. There can be no doubt that considerations such as these were the factors impelling other circuits to adopt a stricter rule requiring that corroboration of extra-judicial admissions include substantial proof of the *corpus delicti*. In *Forte* v. *U. S.* (App. D. C.), 94 F. (2d) 236, it was stated:

> "* * * We feel bound * * * to follow in adopting a rule for this jurisdiction the rule of the great majority of courts in the United States that there can be no conviction of an accused in a criminal case upon an uncorroborated confession, and the further rule, represented by what we think is the weight of authority and the better view in the Federal courts, that such corroboration is not sufficient if it tends merely to support the confession without also embracing substantial evidence of the *corpus delicti* and the whole thereof."

There are numerous decisions in other circuits which support the foregoing decision. *Pines* v. *U. S.* (C. C. A. 8), 123 F. (2d) 825; *Evans* v. *U. S.* (C. C. A. 10), 122 F. (2d) 461; *Galotta* v. *U. S.* (C. C. A. 8), 113 F. (2d) 683; *Gregg* v. *U. S.* (C. C. A. 8), 113 F. (2d) 691; *Ercoli* v. *U. S.*, 131 F. (2d) 354 (App. D. C.); *Tingle* v. *U. S.* (C. C. A. 8), 38 F. (2d) 573; *Wagner* v. *U. S.* (C. C. A. 8), 8 F. (2d) 581; *Martin* v. *U. S.* (C. C. A. 8), 264 F. 950; *Naftzger* v. *U. S.* (C. C. A. 8), 200 F. 494.

The rule which requires establishment of the *corpus delicti* by cogent and convincing proof, in order to justify a conviction, bears a relationship to the rule requiring corroboration of extra-judicial confessions by extrinsic evidence of the *corpus delicti*. In both cases proof of the crime

must be clearly established to support a conviction, although in the latter case the corroborative proof need not establish this beyond a reasonable doubt. Nonetheless, the corroborative evidence together with the extra-judicial confession must establish the crime beyond a reasonable doubt. Those circuits which follow the rule that the corroboration need only support the confession or admission have overlooked the fact that in many cases, such as the one under consideration, admissions do not always contain all of the elements of a crime, and to accept corroborative proof of the admissions as sufficient, is a flagrant misapplication of the rule which requires proof of the *corpus delicti*. Whichever is the better rule, the conflict should be settled by this Court.

B. The Conspiracy Offense

It is needless to cite authorities to support the well-settled legal concept that the essence of a conspiracy is an unlawful agreement or combination to commit a public offense. It is equally well established that one does not conspire with himself or his own corporation. *Union Pacific Coal Co.* v. *United States* (C. C. A. 8), 173 Fed. 737; *Bartkus* v. *United States* (7 C. C. A.), 21 F. (2d) 425. It is not so clear, however, what particular acts involve persons as co-conspirators. The Circuit Court below concludes that petitioner's lively participation in the "Barth Transaction" (R. 425) and his attempts to export to Japan and Mexico present some proof of conspiracy justifying submission of the question to the jury. It will be well to recollect, however, that at the time petitioner purchased the rhodium, and later exported it to Japan, no export control laws were in effect. Obviously there could be no common understanding or agreement to violate a non-existent law. In fact the repeated efforts to obtain export licenses after the law

went into effect belies the existence of any unlawful combination. Even if it were to be assumed that petitioner had knowledge of the fact that Mrs. Mueller intended to carry the rhodium outside the boundaries of the United States, such knowledge could not involve him as a participant in a crime. *United States* v. *Falcone* (C. C. A. 2), 109 F. (2d) 579, affirmed 311 U. S. 199; *Moss* v. *United States* (C. C. A. 6), 132 F. (2d) 875; *Direct Sales Co.* v. *United States*, 319 U. S. 703. The evidence from which the jury was permitted to infer the existence of a conspiracy were petitioner's own extra-judicial admissions which do not establish the *corpus delicti*. In *Tingle* v. *United States*, 33 F. (2d) 573, 575, the defendant was charged with conspiring with others to manufacture and sell intoxicating liquor for use in such manufacture. He signed statements admitting that he had leased a warehouse for a brewery and was aware of the purposes for which it was to be used. The Court ruled:

> "But in conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is, the conspiracy itself, is the gist of the action, and is the *corpus delicti* charged. It is, therefore, primarily essential to establish the existence of a confederation or agreement between two or more persons before a conviction for conspiracy to commit an offense against the United States can be sustained. This statement requires no citation of authorities. It is equally true that, 'extra-Judicial confessions or admissions are not sufficient to authorize a conviction of crime, unless corroborated by independent evidence of the *corpus delicti*.' *Martin* v. *United States* (C. C. A. 8), 264 F. 950. This has been the consistent holding of this court, in harmony with uniform decisions in other jurisdictions. *Naftzger* v. *United States* (C. C. A.), 200 F. 494; *Goff* v. *United States* (C. C. A.), 257 F. 294; *Turinetti* v. *United States*

(C. C. A.), 2 F. (2d) 15. It is necessary, then, to determine whether there is in the record before us any substantial independent evidence of the *corpus delicti*, that is, the conspiracy charged, tending to corroborate the extrajudicial statements and admissions of appellant."

The inference of an unlawful agreement was neither justified or warranted by the proof. *Linde* v. *United States* (C. C. A. 8), 13 F. (2d) 59; *Dahly* v. *United States* (C. C. A. 8), 50 F. (2d) 37; *Goodman* v. *United States*, 128 F. (2d) 854.

Conclusion

The petition for Writs of Certiorari should be granted in order that this Court may clarify and interpret the scope and nature of the Export Control Laws and settle the apparent conflict in the rule concerning the corroboration of extra-judicial admissions or confessions.

Respectfully submitted,

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